IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 16TH OCTOBER 2007 / 24TH ASWINA 1929

CRL.A.No. 1738 of 2003()

SC.538/2000 of ADDL.SESSIONS COURT (ADHOC-I), KASARAGOD

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APPELLANT: ACCUSED:

NARAYANA VELICHAPPADA,
S/O. KUNHI VELICHAPPADA, 32/99, CHEMMAR HOUSE,
ARIYAPPADY, MUGU VILLAGE.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS: COMPLAINANT & STATE:

1. THE SUB INSPECTOR OF POLICE,
BALIADUKA.

2. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY P.P.SRI.THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 16.10.2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO.1738 OF 2003

Dated this the 16th day of October, 2007.

JUDGMENT

The appellant faced trial for an offence under Section 55(a) of the Abkari Act on the allegation that he was found in possession of 35 liters of illicit arrack on 29.7.1999 at a place called Ariyappady in Mugu village at Kasaragod within the limits of Badiaduka Police Station. To prove the case against the appellant, prosecution examined three witnesses and relied on Exts.P1 to P6. On closing the prosecution evidence, when the appellant was questioned under Section 313 of the Code, he had stated that he is innocent and the case was foisted against him on the instigation of a police constable-PW1, who is having some enmity towards him. But, the trial court by the impugned judgment found the appellant guilty under Section 55(a) of the Abkari Act and convicted him thereunder and sentenced to undergo R.I for three and a half years and to pay a fine of Rs.One lakh with default sentence of payment of fine, to undergo R.I for three months more under Section 55(1) of the Act.

2. The counsel appearing for the appellant challenges the

judgment of the trial court on various grounds. The counsel submits that the trial court committed serious error in finding the appellant guilty of the charge only on the evidence of two police officers out of whom, the Sub Inspector concerned was the detecting officer as there was no independence evidence to support the evidence of these official witnesses. Secondly, it is submitted that PW3 - the Sub Inspector of Police, who detected and investigated the crime, had violated the mandatory provisions of the Abkari Act and the Kerala Excise Manual with regard to the procedure to be followed in detecting a crime under the Abkari Act and making seizure of any contraband article or arrest of the appellant as no witness has been examined to prove either seizure of the contraband article or arrest. The counsel further submits that the contraband article alleged to have been seized by PW3 as per Ext.P1 seizure mahazar and the sample alleged to have been taken were not produced before the court in time as there is delay of more than ten days in producing the same before the court and that the delay is not properly explained. The counsel, further, submits that reliance placed by the trial court on Ext.P6 chemical report to find that the contraband seized by PW3 is arrack as Ext.P6 shows that the sample analysed by the chemical analyst was

Karnataka made arrack. Lastly, it is submitted that either the residue or Kannas in which the alleged arrack kept by the appellant, was not produced before the court.

3. The prosecution case as per the evidence of Pws 1 and 3 is that on 29.7.1999 while PW3 the Sub Inspector and other police officials were on law and order duty, they got information that the appellant had kept arrack under a cashew nut tree at a place called Ariyappady in Mugu village and on getting that information, PW3, the Sub Inspector and PW1, the Police Constable and other police officials reached at the place of occurrence at about 7.30 p.m and they searched for the kannas in which the arrack was kept by the appellant. On searching the bushes, the police party seen a white kannas of 35 liters capacity as placed under a cashew nut tree and after seeing that kannas, they hide themselves in the bushes and about half an hour, the appellant came to the scene and he took the kannas on his shoulder. Immediately, PW3 and other police officials went to the appellant and kannas was seized on preparing Ext.P1 seizure mahazar in the presence of two witnesses and the appellant was also arrested at the spot giving arrest memo and thereafter the appellant, the kannas and the

sample bottles taken for analysis, were brought to the police station and a crime was registered against the appellant. Subsequently, as per Ext.P6 report, it was revealed that the sample analysed contained 94.65 and 94.86% ethyl alcohol by volume in both the samples. On the basis of the above report and on completion of the investigation, the case has been charge sheeted against the appellant. The trial court relying on the evidence of Pws 1and 3 found the appellant guilty of the charge. The question to be considered in this appeal is whether the trial court is justified in believing the evidence of Pws 1 and 3. PW3 is the Sub Inspector of Police, according to him, after getting the information, he went to the place of incident at about 7 p.m and stopped the jeep at a distance of 1.5 kms from the place of occurrence. The police party walked at the place where kannas was seen kept and seen that kannas was kept under a cashew nut tree in the bushes and after a search, they have found the kannas as placed under the cashew nut tree. Afterwards, they waited at the place for more than one hour in the night and subsequently they have seen that the appellant was approaching the place where kannas was kept and the appellant took the kannas on his shoulder and about to walk, the police party went near to him and stopped him and questioned

him. It is a matter to be appreciated whether PW3 is speaking the truth before the court. According to PW3, he got information about keeping of the arrack in the bushes at about 7 p.m and after reaching the place in a jeep, the police party and the Sub Inspector walked a distance of one and a half kilometers in the night. Admittedly, the time was after 7 p.m and there is no evidence forth coming to show that there was enough light even to walk through the bushes. Apart from that, Pws 1 and 3 had stated that Ext.P1 mahazar and the arrest memo were prepared at the spot with the aid of a torch and after preparation of the mahazar and taking of the sample, sealed and labeled the same in the presence of two independent witnesses, who signed Ext.P1. It is an unbelievable story spoken by Pws 1 and 3 that they were inside the bushes all the time. In this context it has to be noted that as per the arrest memo produced before the court, the arrest memo is seen signed by the Sub Inspector only on 30.7.1999. This causes some doubt regarding the evidence of Pws 1 and 3. Apart from this, as per Ext.P1, two independent witnesses were there at the time of its preparation. None of these witnesses either questioned or examined before the court. The reason is also not forthcoming. One more aspect in this context has to be considered is that as per

Ext.P2 possession certificate issued by PW2, the Village Officer, would show that the place of incident is a bushy place with full of small plants and cashew sapling and there was no cashew nut tree as such as spoken to by Pws 1 and 3. Further, this witness has stated that the place of incident is an abandoned place as surplus land involved in some cases. Unfortunately, Ext.P2 does not contain the name of the owner of the land and the property is in the possession of the Village Officer as surplus land. In the above circumstances, the case set up by Pws 1 and 3 that they went to the place of incident and had seen the kannas kept under the cashew nut tree is unbelievable and that too, with the aid of a torch. No torch is produced before the court. Presence of torch is not mentioned in Ext.P1 seizure mahazar. Evidence of PW2 would further show that there was no house nearby the place. The two houses near the area are that of the appellant and the witnesses who signed Ext.P1 seizure mahazar and that two houses are about 50 meters away from the bushy place. There is no evidence to show that any pathway or entry to the place from where the kannas was taken or seized by the police. In this context, this court has to see that non- examination of witnesses, who signed Ext.P1 mahazar is very fatal to the prosecution. This is against the principles

adopted by this Court from 1989 onwards as it is held by this Court in **Dominic v. State of Kerala** (1989 KLT 601) that two independent witnesses should have been present for the seizure and taking of the sample, though the alleged search and seizure were not from any dwelling premises. Apart from this, it is the evidence of Pws 1 and 3 that the kannas and the sample were seized on 29.7.1999 but, as per the property list produced before the court would show that the same were produced before the court only on 10.8.1999. No explanation is coming for the delay. One more aspect here to be considered is that as per the forwarding letter Ext.P5, the sample sent for analysis is arrack and as per Ext.P6 chemical report, the sample sent for is two bottles of Karnataka arrack. As per Ext.P1 mahazar and as per the evidence of Pws 1 and 3 there is no case before the court that the police has seized Karnataka arrack. They only stated that they seized arrack. There is difference between Karnataka arrack and the arrack distilled in Kerala. If so, the evidence now adduced by Pws 1 and 3 would not show that any contraband as alleged by the prosecution has been seized from the appellant. In this context, this Court has already found that as per the arrest memo produced before the court on 30.8.1999 would show that the appellant was arrested

from a different place on 30.8.1999. So, arrest or seizure of the contraband from the appellant as alleged by the prosecution cannot be accepted. Apart from this, it is to be noted that, according to Pws 1 and 3, two samples were taken from the kannas in which the arrack has been kept by the appellant. In Ext.P5 forwarding letter, it is stated that two bottles having the capacity of 375 ml and 350 ml of Karnataka made arrack have been taken as sample whereas as per Ext.P6, it is stated that the sample bottle contained 300 ml of Karnataka arrack. In this context, the evidence of Pws 1 and 3 is also contradictory. PW3 had stated that sample was taken in two bottles having the capacity of 375 ml and he had taken 375 ml for analysis but PW1 had stated that only 350 ml was taken for analysis. Whatever may be the difference in the quantity taken for analysis, the question is that whether the said sample has been taken by PW3 for analysis and the substance which is sent for analysis is Karnataka arrack or arrack made in Kerala. In this context, one more aspect to be considered is that as per the property list sent to the court, the learned Magistrate had endorsed to the effect that verify and return for custody. But, when the trial started in the court, no material has been produced before the court to verify the factum of seizure either the kannas alleged to have been contained

arrack or even the recital of any of such things before the court and there is no explanation coming for non-production of the residue before the court. This action also is against the principles laid down by this Court as per the judgment reported in **Narayanai v. Excise Inspector** (2002 (3) KLT 725). In the above case, this Court had categorically held that it is the duty of the prosecution to produce the residue and the sample before the court within a reasonable time so as to rule out the possibility of tampering the same. In the light of the above principle, non-production of the residue or any other material before the court would show that the alleged seizure was not proved. In this context, it is to be noted that as per the case of the appellant, when he was examined under Section 313 he was arrested by the police on 30.8.1999 at a different place and the case is foisted against him on the instigation of PW1, the Police Constable. Though the case set up by the appellant is not proved, the circumstance under which the alleged recovery of the contraband creates doubt regarding the prosecution case and not giving confidence on this court to believe the evidence of Pws 1 and 3. Benefit of doubt has to be given to the appellant. In this context, this Court see that this is the 11th case in which the police of the Kasaragod District had registered some cases against

some accused in which no material object has been produced before the trial court or any material has been produced before the court to show that the alleged seizure is correct or not. In some cases, this Court had noted that the Sub inspector had written letters to the trial court saying that all the materials seized were ruined at the thondi room of the police station and it cannot be produced and the court was forced to accept such letters. This attitude of the officers, who detected offences under the provisions of the Abkari Act, is against the mandatory provisions contemplated under Section 53 A of the Act. Section 53 A casts duty on the police officers or the excise officers to produce sufficient and primary evidence to show that the contraband has been seized as alleged by the prosecution before the court either by producing the residue or the sample or even photographs of such materials alleged to have been seized before the court or even a certificate from the Magistrate should have been produced before the trial court.

In the above circumstances, this Court is of the view that findings of the trial court entered against the appellant are not based on any legally acceptable evidence. Accordingly, judgment of the trial court is set aside and the appellant is find not guilty of the offences. He is acquitted of all the charges. The bail bond

executed by the appellant shall stand cancelled. It is also made clear that, if any amount has been deposited by the appellant, that shall be refunded to him a s per law.

K. THANKAPPAN, JUDGE.

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